

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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:
WILLIAM PINERO, :
:
Petitioner, : 01 Civ. 9991 (DLC)
:
-v- : OPINION AND ORDER
:
CHARLES GREINER, :
:
Respondent. :
-----X

Appearances:

For Petitioner:
Damond J. Carter
P.O.Box 6365
Albany, New York 12203

For Respondent:
Mary Jo L. Blanchard
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DENISE COTE, District Judge:

William Pinero ("Pinero") brings this petition for a writ of habeas corpus under 28 U.S.C. § 2254, following his 1997 conviction for murder in the Supreme Court of New York, Bronx County. On May 25, 2007, Magistrate Judge Douglas F. Eaton issued a report (the "Report") recommending that the petition be denied. Pinero has objected to the Report. For the following reasons, the Report is adopted, and the petition is denied.

BACKGROUND

As described in detail in the Report, the evidence at trial established that on November 2, 1994, Pinero accompanied another man, identified as Michael Kealing, to the Bronx office of victim Glenn Walker, a Christmas tree vendor. While Pinero restrained Walker's associate, Dirceline Delgado, Kealing shot and killed Walker. The prosecution rested its case primarily on Delgado's eyewitness identification of Pinero and Pinero's post-arrest statements.

Delgado was hysterical and able to provide only a limited description of the two perpetrators immediately following the murder, but more than seven months later she selected Pinero from a photo array produced by the police. Pinero was then arrested. More than six months after that identification, Delgado selected Pinero from a lineup. Pinero, after receiving Miranda warnings from the police, provided several incriminating details about the murder and also repeatedly asked the investigating police detective "what kind of deal" he would get if he admitted to being present at the murder. Pinero's defense rested on a claim that Delgado had misidentified him and on an alibi provided by Pinero's former girlfriend, who testified that Pinero was with her at the time of the murder.

The prosecution also introduced evidence that Pinero was part of a conspiracy to extort money for the right to sell

Christmas trees at a certain Bronx location. Testimony from Walker's widow and Delgado established that Walker had paid protection money to certain unnamed persons in 1992, but stopped paying 1993 and 1994. In December 1992, two fires that were designated "nonaccidental" by the Fire Department occurred at Walker's Christmas tree lot. George Nash, who began selling Christmas trees in that lot after Walker's murder, testified that Pinero collected \$10,000 in protection money from him in December 1994. The prosecution argued that all of these events -- Walker's 1992 payments, the 1993 fires, Walker's 1994 murder, and Nash's payments to Pinero -- were part of a single extortion conspiracy concerning the rights to sell Christmas trees on the lot where both Walker and Nash worked. Pinero was convicted by a jury and sentenced to twenty-five years to life.

Following conviction and sentencing, Pinero's case wended a circuitous path through the New York state and federal courts. On direct appeal, Pinero argued that (1) admission of evidence of uncharged crimes violated his rights to due process and to a fair trial; (2) the photographic array in which he was identified was unduly suggestive because he was the only person pictured with the sole distinguishing characteristic mentioned by the complainant; (3) the trial court deprived him of the opportunity to present relevant exculpatory evidence, to wit, a scar; (4) his due process right to a fair trial was violated by

the prosecution's treatment of his alibi witness and the jury charge on the alibi defense; (5) a mistrial should have been granted because of the investigating detective's efforts to bolster Delgado's identification of Pinero; and (6) he was deserving of a less harsh prison sentence. The New York Supreme Court, Appellate Division unanimously affirmed the conviction and sentence, see People v. Pinero, 706 N.Y.S.2d 28 (1st Dep't 2000) ("Pinero"), and the New York Court of Appeals denied leave to appeal, see People v. Pinero, 714 N.Y.S.2d 7 (2000) (Table). Pinero's conviction became final on October 26, 2000.

Collateral attacks in state court ensued. In November 2001, Pinero pro se filed a petition coram nobis, alleging that his appellate counsel had provided ineffective assistance by failing to raise (1) ineffective assistance of trial counsel in failing to request certain pretrial hearings; (2) a constitutional challenge based on the prosecutor's peremptory challenges to two black veniremen; (3) the trial court's error in denying defense counsel's application to remove a particular juror; and (4) the court's failure to respond adequately to a jury request for a readback of testimony. The Appellate Division denied the petition in 2002. A second coram nobis petition was filed by Pinero's retained counsel in the summer of 2003, alleging that (1) Pinero's trial counsel had been informed that Delgado had perjured herself, but failed to inform the

judge; (2) trial counsel failed to advise Pinero concerning the wisdom of taking a plea offer allegedly made by the state during the trial; and (3) trial counsel failed to act on an allegation by Pinero's parents that certain jurors were sleeping during trial. The Appellate Division denied this petition in 2004. In a subsequent motion under New York Criminal Procedure Law § 440, Pinero essentially restated the arguments made in his second coram nobis petition and added one additional claim that his trial counsel failed to make use of material exculpatory evidence in his possession. The Appellate Division denied this petition and dismissed Pinero's appeal.

While he was seeking collateral relief in state court, Pinero was also pursuing habeas relief in federal court. His pro se habeas petition was received by this district's Pro Se Office on October 22, 2001. By letter dated November 20, 2001, Pinero acknowledged that his petition contained unexhausted ineffective assistance of counsel claims. Those claims were dismissed, and the remainder of the petition was stayed. That stay was lifted in March 2003 upon Pinero's request, and he submitted an amended habeas petition. The amended petition raises the following ten grounds:

Ground One Petitioner was denied due process when the admission of uncharged crimes deprived him of a fair trial, where the evidence was not relevant for any permissible purpose and its prejudicial effect greatly outweighed its probative value.

Ground Two Petitioner was denied equal protection where the prosecution was allowed to peremptorily challenge all male prospective jurors during jury selection.

Ground Three Petitioner was denied his right to a fair trial when an unduly suggestive photograph which singled out petitioner by a single distinguishing characteristic mentioned by the complainant was admitted into evidence.

Ground Four Petitioner was denied his due process right to a fair trial when the court gave a charge that relieved the people of their burden to disprove petitioner's alibi defense beyond a reasonable doubt and equated the jury's disbelief of the alibi testimony with conclusive proof of petitioner's presence at the crime scene.

Ground Five Petitioner was denied due process and a fair trial by the prosecutor's cross-examination of petitioner's alibi witness by focusing on juvenile criminal proceedings.

Ground Six Petitioner was denied effective assistance of trial counsel when counsel neglected to secure a Dunaway hearing after [he had] requested one and was granted a hearing.

Ground Seven Petitioner was deprived of due process and a fair trial by the court's refusal to allow the defendant to publish his scar to the jury unless the prisoner testified.

Ground Eight Petitioner was deprived of due process and a fair trial when the Court refused to grant a mistrial for the detective telling the jury that the eyewitness picked petitioner out of the photo array.

Ground Nine The sentence imposed was harsh and excessive in violation of the Eighth Amendment.

Ground Ten Appellate counsel was ineffective for failing to raise a claim of ineffective assistance of trial counsel due to counsel's failure to use probative impeachment material, failure to alert the trial court to juror misconduct, and improperly advising petitioner with regard to his plea options.

The matter was referred to Magistrate Judge Douglas F. Eaton, and on October 31, 2005, Assistant District Attorney Mary Jo L. Blanchard served and filed an Affidavit in Opposition to

Pinero's habeas petition and argued that it should be denied. Following issuance of Magistrate Judge Eaton's May 25, 2007 Report, Pinero, now represented by counsel, filed objections to most of its recommendations and asserted that the state court's errors

resulted in Mr. Pinero's right to a fair trial being violated where the trial court improperly admitted evidence of prior uncharged crimes, charged the jury with an imbalanced jury charge, precluded Mr. Pinero's right to present evidence in his defense, allowed the State to proceed where it employed suggestive identification procedures and elicited testimony that the state's pivotal witness had identified Mr. Pinero by way of pre-trial criminal procedures, and allowed the State to improperly cross examine the Defense alibi witness and where Mr. Pinero was afforded ineffective assistance of trial and appellate counsel.

Moreover, Pinero noted that his failure to argue any particular issue did not evidence an intention to abandon that claim.

Rather, "[i]n such a case, where the issue has not been abandoned, Petitioner will rely upon his previous submissions for the claim in question." The state replied, and Pinero sur-replied.

DISCUSSION

The Report identifies ten different claims in the petition and recommends rejection of each of them. The court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). The court shall make a de novo determination of

the portions of the report to which petitioner objects. 28 U.S.C. § 636(b)(1); see United States v. Male Juvenile, 121 F.3d 34, 38 (2d Cir. 1997). To accept those portions of the report to which no timely objection has been made, "a district court need only satisfy itself that there is no clear error on the face of the record." Figueroa v. Riverbay Corp., No. 06 Civ. 5364(PAC), 2006 WL 3804581, at *1 (S.D.N.Y. Dec. 22, 2006) (citation omitted).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, modified the standard under which federal courts review Section 2254 petitions. Habeas relief may not be granted unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §§ 2254(d)(1),(d)(2). Each of the claims addressed in the Report is described below, with particular attention given to those that are the subject of Pinero's objections.

A. Grounds Two and Ten Barred by Statute of Limitations

The Report found that Grounds Two and Ten were barred by the one-year statute of limitations for habeas petitions imposed by 28 U.S.C. § 2244(d)(1) because the issues were raised for

the first time in Pinero's coram nobis petitions, both of which were filed more than one year after his conviction became final, and were only incorporated into the amended habeas petition after the statute of limitations expired.¹ As the Report noted, "any claim that was not contained in [Pinero's] 10/15/01 petition . . . would be time-barred unless it is subject to statutory or equitable tolling, or fits under a statutory exception." The Report considered and rejected Pinero's arguments that Grounds Two and Ten fell within various exceptions that rendered them timely. Pinero now objects to the Report's determination and claims that the statute of limitations period should be "tolled while properly filed applications for State post-conviction relief are pending."

Pinero's argument fails because the coram nobis petitions at issue were filed after the one-year statute of limitations on his habeas petition had already run. There was thus no

¹ This finding rests on the following chronology. Pinero's conviction became final on October 26, 2000. His habeas petition was received by the district court within one year of that date, on October 22, 2001. He filed his first coram nobis motion on November 20, 2001 -- after the one-year statute of limitations expired. By order dated June 27, 2003, Magistrate Judge Eaton instructed Pinero to file his second coram nobis motion by July 28, 2003, and to provide to the court a detailed affirmation "within 30 days after Pinero receives the final decision by the state court." Pinero filed the motion in compliance with Magistrate Judge Eaton's order, and the New York Court of Appeals issued its final decision denying the motion on September 13, 2004. Pinero, however, did not inform the court of this decision until March 8, 2006.

limitations period to be tolled during the pendency of the coram nobis petitions. Moreover, the Report correctly found that Pinero's argument that the statute of limitations begins to "run anew" each time a state court makes a new decision on a habeas petitioner's applications for state collateral relief must be rejected because "[i]f the one-year period began anew when the state court denied collateral relief, then state prisoners could extend or manipulate the deadline for federal habeas review by filing additional petitions in state court." Smith v. McGinnis, 208 F.3d 13, 17 (2d Cir. 2000). Accordingly, Pinero's argument that Grounds Two and Ten are timely fails, and these two proffered bases for habeas relief are barred.

B. Ground One -- Evidence of Uncharged Crimes

The trial court admitted a significant amount of evidence, over Pinero's objection, showing that Walker's murder was part of a pattern of extortionate activity in which Pinero participated -- specifically, evidence of extortion and arson by persons other than Pinero against Walker, and of extortion against Nash. The evidence would be admitted, the trial court ruled, only "as background narrative, to explain defendant's motive and shared intent to murder Walker, as well as the absence of any mistake or accident." On direct appeal from Pinero's criminal conviction, the Appellate Division ruled that

the trial court had acted within its discretion in admitting this evidence because

[t]he challenged evidence, taken as a whole and in connection with the other evidence adduced at trial, provided strong circumstantial proof that defendant and his companion, acting as agents of a criminal conspiracy, killed the deceased, a vendor of Christmas trees, because he stopped paying protection money. The nexus between defendant, the various events, and the instant crime was clearly established.

Pinero, 706 N.Y.S.2d at 29. The Report rejected Pinero's habeas challenge to the admission of this evidence because the evidence was not "sufficiently material to provide the basis for conviction or to remove a reasonable doubt that would have existed on the record without it." Dunnigan v. Keane, 137 F.3d 117, 125 (2d Cir. 1998) (citation omitted). The Report further noted that the trial court instructed the jury to consider the uncharged "wrong acts" only with respect to motive and intent, and that "[n]othing in the instructions allowed a juror to consider this as 'propensity evidence.'"

Ground One of Pinero's habeas petition alleges that his due process rights were violated by the prosecution's introduction of the evidence of uncharged crimes. In his letter to the Court responding to the state's reply to his objections, Pinero frames his objection thusly:

[T]he State's use of the uncharged crimes and prior bad acts was improper and prejudicial, because (1) all parties agree that the Petitioner had no involvement in the reprehensible alleged uncharged crimes and

prior bad acts that were somewhat similar to the allegations alleged at trial, and (2) that Estelle [v. McGuire, 502 U.S. 62 (1991)] is distinguishable from Petitioner's case, because in Estelle the prosecution sought to prove an element of the offense, where as [sic] in Petitioner's case the prosecution had not indicted on the conspiracy allegation.

Neither the prosecution nor the trial court suggested that Pinero was personally involved in each of the "wrong acts" alleged. Rather, the trial court made clear that the evidence was to be considered only to show "that there was a motive for this particular incident, for this particular crime [with] which the defendant is charged," and found that this purpose was within the evidentiary exception established by People v. Molineux, 61 N.E. 286 (N.Y. 1901). Pinero does not appear to cavil with the trial court's finding under New York law, and his ostensible argument under the United States Constitution fails. Estelle does not prohibit the consideration of evidence of uncharged crimes for the purposes identified by the trial court, nor does it require, as Pinero appears to argue, that the uncharged acts alleged prove an element of the crime for which the defendant was charged.²

² Pinero appears to argue that there was error in the prosecution's suggestion that Walker's murder was part of an extortion "conspiracy," because Pinero was charged only with accomplice liability, and not conspiratorial liability. There is no merit to this claim. The prosecution's, and trial court's, use of the word "conspiracy" to describe the sequence of events concerning Christmas tree vendors in a certain Bronx

C. Grounds Three and Eight -- Photo Array

Ground Three alleges that the photo array in which Delgado identified Pinero was tainted because (1) Pinero's photo was different from the others shown in tint and color, and (2) Pinero's photo was the only one shown in which the man had a "thin as opposed to heavy mustache." The trial court admitted testimony concerning the array and identification over Pinero's objection, observing that while there were differences among the pictured men's mustaches, "what's more important is that the general racial and facial characteristics of all six of these photographs are strikingly similar." Further, the trial court found that the police officers who showed Delgado the array had not "in any way engaged in any kind of improper conduct in order to suggest to the witness to select the defendant's photograph from this photo array." The Report rejected Pinero's contention that the photo array was impermissibly suggestive, finding no reason to disagree with the trial court's assessment of the array and the police officer's presentation of it. The Report rejected Ground Eight of Pinero's habeas petition because it referred to testimony that was stricken from the trial record.

Pinero objects to both of the Report's findings. With respect to Ground Three, Pinero first reasserts that he "stood

location does not bear in any way on the particular theory of liability under which Pinero was convicted.

out from all the other persons [in the photo array] and the photo used was clearly distorted in comparison to the rest." Second, Pinero makes much of the fact that after Delgado identified him in a photo array, the police officers decided to show her a second array. He claims that this reflected a belief on the police's part "that the person who held Ms. Delgado down during the events in question was contained in the second photo array," and that Delgado's identification of Pinero in the first array proves the array's suggestiveness. Moreover, Pinero claims that Delgado "did in fact identify two persons" in the photo array that did not include a picture of him, apparently suggesting that her identification of Pinero in the first array was unreliable.

All of Pinero's objections are meritless. First, Pinero's objection to the array's suggestiveness does nothing to detract from the trial court's determination that the array and its presentation to Delgado were in compliance with constitutional dictates. Because this objection merely restates the argument rejected by the Report, it is again rejected here. Second, the police officer who showed the array to Delgado testified that he originally believed that Pinero had been driving the getaway car for the perpetrators of Walker's murder, and that the individual or individuals who restrained Delgado were pictured in the second array he showed to her. He was therefore "shocked" when

Delgado identified Pinero as the one who had restrained her. Without more, the police officer's belief about the identity of a suspect prior to a photo array identification by the sole eyewitness to a crime is not probative of that array's suggestiveness. Accordingly, this argument fails. Further, the police officer testified only that Delgado "recognized" two men in the second photo array; she did not link them in any way to Walker's murder. Because this recognition does not bear in any way on her identification of Pinero as the one who restrained her, this argument fails as well.

With respect to Ground Eight, Pinero again avers that the prosecution violated his right to a fair trial by informing the jury that Delgado had identified him through the photo array. As the Report noted, this testimony was stricken from the trial record, and Pinero's claim therefore lacks merit.

D. Ground Four -- Jury Instruction concerning Alibi Defense

Pinero's ex-girlfriend Stephanie Baldes served as an alibi witness for him, testifying that he was with her and another man at the time of Walker's murder. The trial court declined Pinero's request to include an instruction that "it is the People who must disprove the alibi beyond a reasonable doubt," and Ground Four alleges that the omission of those words was error. Ground Four further posits that the charge as given relieved the state of the burden of proving Pinero's guilt

beyond a reasonable doubt. The Report rejected this argument, finding that the trial court's charge was adequate because it "instructed the jury about the presumption of innocence" and "reiterated numerous times that the burden of proof was on the People to prove every element of the crime beyond a reasonable doubt." Pinero states that his defense hinged upon his alibi, and objects that the trial court failed "to properly articulate the State's burden of disproving that Defense," thereby "markedly undermin[ing] the weight to be accorded the Defense's alibi evidence." Specifically, Pinero takes issue with the trial court's instruction that "if the evidence as to alibi, either by itself or when taken into consideration with all the other evidence, raises a reasonable doubt in your minds as to this defendant's guilt, he is entitled to acquittal." He claims that this instruction engendered an "inference . . . that the Defense had the burden of not only reasonable doubt, but the Defense[']s alibi evidence had to create reasonable doubt."

As the Supreme Court has instructed, a federal habeas court must evaluate a trial court's jury instruction to determine "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Cupp v. Naughten, 414 U.S. 141, 147 (1973). Examining the charge as a whole, the habeas court must assess "whether there is a reasonable likelihood that the jury understood the instructions

to allow conviction based on proof insufficient to meet the standard of proof beyond a reasonable doubt." Vargas v. Keane, 86 F.3d 1273, 1277 (2d Cir. 1996) (citation omitted). In the instant case, as the Report observed, the trial court repeatedly instructed the jury on the presumption of innocence and that it was the state's "responsibility to prove beyond a reasonable doubt all the elements of each crime including the fact that the defendant was present at the time and place of the incident." The trial court further advised the jury that "[t]he defendant has no obligation to prove or disprove anything, including his whereabouts." Given these instructions, neither the omission to which Pinero objects nor the alleged inference raised by the alibi instruction could have led the jury to misunderstand that the burden of proof rested on the state. Because there was no likelihood of a conviction based on insufficient proof, there was no constitutional error in the jury charge and Pinero's objection is rejected.

E. Ground Five -- Cross-Examination of Alibi Witness

The trial court allowed the prosecution to question Pinero's alibi witness, his ex-girlfriend Stephanie Baldes, about a theft to which she had allegedly pleaded guilty in Toronto, Canada in 1986, even though the prosecution had no documentary evidence of the plea. Pinero claims that this questioning violated New York law, which he argues proscribes

cross-examination of a witness as to a prior conviction without providing documentary proof substantiating that conviction, and therefore violated his right to a fair trial. The Report rejected this argument and found that the "prosecutor's limited questioning of Baldes did not deprive Pinero of a fair trial," because (1) the prosecutor "was not able to get the admission he wanted from her," (2) "[t]he jury was free to believe all or part or none of her testimony," and (3) the line of questioning "probably had little effect on the jury, certainly not to the extent to make the trial unfair."

In cursory fashion, Pinero's objection repeats his original contention that the prosecution's cross-examination of Baldes violated New York state law. This argument, however, does nothing to shed light on whether his conviction violated the United States Constitution. As the Report made clear, citing Supreme Court precedent, "it is not the province of a federal habeas court to reexamine state court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution . . . of the United States." Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). Because Pinero has not identified any way in which the cross-examination violated his constitutional rights, this objection fails.

F. Ground Six -- Ineffective Assistance of Trial Counsel

Ground Six alleges that Pinero's trial counsel provided ineffective assistance because he failed to conduct pre-trial probable cause hearings under Dunaway v. New York, 442 U.S. 200 (1979). The Report rejected this argument because Pinero's trial counsel had conducted other types of pre-trial hearings, and because Delgado's positive photo array identification of Pinero as the man who had restrained her during Walker's murder provided probable cause for Pinero's arrest. Pinero objects and claims that a Dunaway hearing would have forced the police department to explain "how was it that he became the focal point of this criminal investigation," even though the physical description initially given by Delgado was general and "cryptic."

This argument is meritless. Under Strickland v. Washington, 466 U.S. 668, 687 (1984), a defendant claiming ineffective assistance of counsel must prove that his counsel's performance was deficient and that the deficient performance prejudiced the defense. Because it is beyond peradventure that as there was probable cause for Pinero's arrest -- to wit, Delgado's identification of him in a photo array -- Pinero could not have benefited from a Dunaway hearing. Because there was no prejudice to Pinero, Ground Six of his habeas petition fails.

G. Ground Seven -- Publication of Pinero's Scar

Pinero claims in Ground Seven that he was deprived of his due process right to a fair trial by the trial court's refusal to allow him to publish his scar to the jury unless he testified. According to Pinero, his former roommate and a police detective offered discrepant testimony about whether Pinero had any distinguishing marks or features, and the detective's failure to recall the scar on Pinero's head called into question the reliability of his testimony. The trial court appears to have rejected Pinero's request for lack of foundation, noting that there was nothing in the trial record describing "when that scar was created or whether it was there at such time as you claim the detective should have seen it." The trial court deemed the scar "testimonial," and ruled that Pinero could only publish it to the jury if he would submit to cross-examination.

The Report opined that the trial court might have erred in this ruling but nonetheless found that its decision was not contrary to, or an unreasonable application of, Supreme Court precedent establishing that a defendant is not denied "a fair opportunity to defend against the State's accusations whenever critical evidence favorable to him is excluded." Montana v. Egelhoff, 518 U.S. 37, 53 (1996) (plurality opinion of Scalia, J.). Likewise, the Report discerned no error in the Appellate Division's finding that any error by the trial court "did not

result in prejudice to [Pinero] in view of the minimal probative value of the scar and the fact that defendant made the jury aware of the scar in any event," or its observation that "there was overwhelming evidence of defendant's guilt." Pinero, 706 N.Y.S.2d at 29.

Pinero's objection notes the trial court's possible error in regarding his scar as "testimonial," and states in conclusory fashion that the trial court's preclusion of this evidence "violates Mr. Pinero's right to present evidence." The Supreme Court has made clear that there is no "absolute entitlement to introduce crucial, relevant evidence," and that "the introduction of relevant evidence can be limited by the State for a valid reason." Egelhoff, 518 U.S. at 53 (plurality opinion of Scalia, J.) (citation omitted). Here, the trial court denied Pinero's request to publish his scar because of a lack of foundation concerning the scar's provenance and age. Because this was a valid reason for excluding the evidence, there was no error in this evidentiary ruling.

H. Ground Nine -- Excessive Sentence

Pinero claims that his sentence of twenty-five years to life violates his rights under the Eighth Amendment. The Report rejected this claim because a sentence within the range permitted by state law -- as this sentence is -- presents no federal constitutional issue. See White v. Keane, 969 F.2d

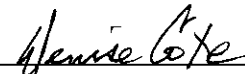
1381, 1383 (2d Cir. 1992). Pinero does not make any specific objection to the Report's finding, but rather relies upon previous submissions. Because there was no error in the Report's statement or application of the law, this argument is rejected.

CONCLUSION

Having reviewed the Report with care, there is no facial error in its conclusions. For the reasons given in this Opinion, Pinero's objections to the Report are denied following a de novo review of his claims. Pinero's petition is denied. No certificate of appealability shall issue. Pinero has not made a substantial showing of a denial of a federal right, and appellate review is therefore not warranted. Love v. McCray, 413 F.3d 192, 195 (2d Cir. 2005). Moreover, any appeal from this order would not be taken in good faith. See 28 U.S.C. § 1915(a)(3); Coppedge v. United States, 369 U.S. 438, 445 (1962). The Clerk of Court shall dismiss the petition.

SO ORDERED:

Dated: New York, New York
September 17, 2007



DENISE COTE
United States District Judge

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